

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

ORIGINAL

77-7238

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FRANK SANTORA and JOHN S. IANNONE,

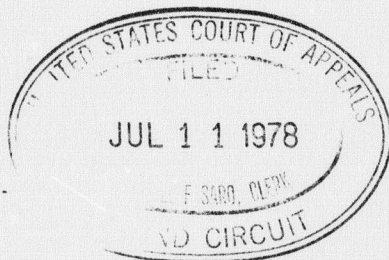
Plaintiffs-Appellant,

-against-

THE CIVIL SERVICE COMMISSION, City of New York;
ALPHONSE D. D'AMBROSE, Personnel Director and
Chairman, Department of Personnel, Civil Service
Commission; ANTHONY R. AMERUSO, Commissioner of
Highways; and HARRISON J. GOLDIN, Comptroller,

Defendants-Appellees.

APPELLEES' PETITION FOR REHEARING OR
IN THE ALTERNATIVE FOR REHEARING EN BANC



ALLEN G. SCHWARTZ,
Corporation Counsel of
the City of New York,
Attorney for Appellees,
Municipal Building,
New York, N.Y. 10007.
(212) 566-4327 or 4337

L. KEVIN SHERIDAN,
FRANCIS F. CAPUTO,
of Counsel.

UNITED STATES COURT OF APPEALS
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APPELLEES' PETITION FOR REHEARING OR
IN THE ALTERNATIVE FOR REHEARING EN BANC

To the Honorable Judges of the United States
Court of Appeals for the Second Circuit

Appellees present this petition for rehearing or, in the alternative, for rehearing en banc, of this Court's decision dated June 20, 1978, insofar as it vacated the judgment of the United States District Court for the Southern District of New York (WERKER, J.) and remanded the case for further proceedings.

Rehearing, or, in the alternative, rehearing en banc, is sought pursuant to Rules 40 and 35 of the Federal Rules of Appellate Procedure, on the ground that the panel's decision to allow this action to continue as an action based upon the 14th Amendment, with jurisdiction predicted on 28 U.S.C. § 1331 was erroneous. Specifically, we ask the

panel, or the Court en banc, to reconsider the holding in Turpin v. Mailet, slip opinion 3243 (2d Cir., June 5, 1978) upon which the instant decision is based, in light of the Supreme Court's decision, the next day, in Monell v. Department of Social Services of the City of New York, ___ U.S. ___, 46 U.S.L.W. 4569 (June 6, 1978).

Although the issue raised here was given plenary consideration only recently by the Court in Turpin, supra, we think the wholly unexpected decision in Monell, announced the very next day, overruling Monroe v. Pape, 365 U.S. 167 (1961), merits consideration by this Court.

ARGUMENT

SINCE CONGRESS HAS PROVIDED A STATUTORY CAUSE OF ACTION AGAINST MUNICIPALITIES TO VINDICATE FOURTEENTH AMENDMENT RIGHTS, IT IS NEITHER NECESSARY NOR APPROPRIATE TO CONSTITUTIONALIZE THE VERY SAME CAUSE OF ACTION.

(1)

Plaintiffs began this suit under 42 U.S.C §§ 1981 and 1983, and as an action based directly upon the Fourteenth Amendment. This Court affirmed the holding of the District Court that the statutory causes of action were time-barred by the applicable three-year statute of limitations, but vacated the judgment and remanded for reconsideration of the question of the appropriate statute of limitations applicable to an action under the Fourteenth Amendment. In light of the fact that all defendants were properly suable parties in the § 1983 action, we think this was error.

The decision in Turpin, supra, was reached under the assumption that the municipal defendant involved was excepted from liability under the provisions of 42 U.S.C. § 1983. Subsequently, in the Monell decision, the Supreme Court held that municipalities can be sued directly under § 1983 for their own unconstitutional acts. In defining the contours of municipal liability under the statute, it is significant that the Supreme Court's formulation of statutory liability is identical to the direct, constitutional liability created by this Court in its Turpin decision, particularly in that both Courts rejected the notion of respondeat superior liability. Compare Monell, supra, 46 U.S.L.W. at p. 4579, with Turpin, supra, slip opinion at pp. 3269-3270. See order in Grant v. Board of Education, (77-7161) decided June 22, 1978, p. 2, indicating that the test for municipal liability laid down in Monell is controlling and substantially identical to the test in Turpin. Since the statutory and constitutional causes of action are identical, so far as they are presently defined, creation of the constitutional cause of action cannot be said to be appropriate or necessary. See Turpin, supra, slip opinion at p. 3270 ("Courts should only create a cause of action where none exists or the need for one is demonstrated.") That the constitutional cause of action is no longer a viable alternative would appear to be the view of at least one member of the Monell majority. Monell, supra, 46 U.S.L.W.

at p. 4584 (Powell, J., concurring opin.) ("Rather than constitutionalize a cause of action against local government that Congress intended to create in 1871, the better course is to confess error and set the record straight, as the Court does today.").

To allow the Turpin decision to stand after Monell would needlessly involve the courts and litigants in a lengthy process of evaluation of constitutional tort jurisprudence where there already exists a well-developed body of case law construing § 1983. Questions involving the application of the doctrines of absolute and qualified immunity would have to be decided. The question of the appropriate statute of limitations is raised in the instant case. To the extent that the constitutional tort jurisprudence tracks the considerable body of appellate decisions involving § 1983, the exercise would be one of futility to a plaintiff who chooses to prosecute a constitutionally based suit in the hope of gaining some tactical advantage not available in a suit under § 1983. To the extent that future development of law may allow such an advantage, we think such result would be unseemly. No reading of Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), nor of this Court's majority opinion in Turpin, supra, supports the proposition that a cause of action may be constitutionalized in order to circumvent defenses like the statute of limitations that would effectively bar an identical, but statutorily-based, cause of action.

Here, unlike the situation in Bivens, supra, affirmative action by Congress is not absent. Congress has provided a comprehensive remedy, including liability for money damages, to redress violations of constitutional rights by municipal governments. For this Court to create a constitutional cause of action for the sole purpose of narrowing defenses available in a statutory cause of action would be an exercise of judicial rule making directly at odds with the constitutionally devised separation of powers in our federal government. We do not think that such a result was anticipated by the majority in Turpin, who took pains to point out that "implied remedies must, in nature and scope be 'consistent' with the legislative enactments already governing an area". Turpin, supra, slip opinion at p. 3271.

In sum, the instant case is inappropriate for the exercise of the Court's power to imply a cause of action directly from the Constitution. It serves no purpose but to allow plaintiffs to circumvent the statute of limitations applicable to actions under § 1983.

CONCLUSION

It is respectfully submitted that for the reasons stated, the panel's decision should be reconsidered in light of the decision in Monell and should be vacated, or, in the alternative, should be reviewed by this Court en banc and vacated.

July 11, 1978

Respectfully submitted,

ALLEN G. SCHWARTZ,
Corporation Counsel
of the City of New York,
Attorney for Appellees.

L. KEVIN SHERIDAN,
FRANCIS F. CAPUTO,
of Counsel.

AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

Caroline Renna being duly sworn, says that on the 11th day
of July 1978, he served the annexed Petition for Rehearing upon
Jeremiah B. McKenna Esq., the attorney for the Appellants
herein by depositing a copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and
Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the
United States in said city directed to the said attorney at No. 358 St. Marks place in the
Borough of Staten Island City of New York, being the address within the State theretofore designated by
him for that purpose.

Sworn to before me, this

11th day of July 1978

Peggy C. Wright
PEGGY C. WRIGHT
Commissioner of Deeds
City of New York No. 4-2073
Commission Expires June 1, 1980
Caroline Renna

